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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE GUARDIANSHIP and ADOPTION OF M.S.G. and N.B.C., WILL and STACY FERGUSON, MARK and ANGELA CLINTON,	)	
Appellants-Petitioners,	)	
vs.	)	No. 14A01-0512-CV-535
ROBERT GARRISON and GINGER COMBS,	)	
Appellees-Respondents,	)	
and	)	
MITCH and PATTY AHRENS,	)	
Interveners.	)	

APPEAL FROM THE DAVIESS CIRCUIT COURT
The Honorable Robert L. Arthur, Judge
Cause Nos. 14C01-0308-GU-19, 14C01-0310-GU-27,
14C01-0411-AD-227 and 14C01-0411-AD-228

August 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Will and Stacy Ferguson (the Fergusons) petitioned to adopt M.S.G., and Mark and Angela Clinton (the Clintons) petitioned to adopt N.B.C. After a hearing, the trial court concluded the consent of the biological parents was necessary. The Fergusons and the Clintons now appeal, and present the following restated and consolidated issue: Did the trial court err in concluding the biological parents' consents to the adoptions were necessary?

We affirm.

The facts favorable to the judgment are that M.S.G. is four years old and the biological child of Ginger Combs and Robert Garrison (collectively, the parents when referred to jointly). N.B.C. is five years old and the biological child of Combs and Ivan Keith Combs (Keith). Both M.S.G. and N.B.C. lived with the parents. On July 8, 2003, the Fergusons obtained physical custody of M.S.G. and N.B.C. because the parents were being evicted from their home and needed temporary assistance with the care of M.S.G. and N.B.C. After being evicted from their home, the parents lived in a friend's home and

thereafter in their car. The arrangement with the Fergusons initially was intended by all parties to be temporary and last only two or three weeks. On August 1, 2003, the Clintons obtained physical custody of N.B.C. from the Fergusons because the Fergusons "c[ouldn't] handle both of them . . . ." *Transcript* at 134.

On August 8, 2003, the parents consented to the Fergusons' guardianship of M.S.G. and Combs and Keith consented to the Clintons' guardianship of N.B.C. On August 26, 2003, the Clintons petitioned the trial court to be appointed as co-guardians of N.B.C., and on October 14, 2003, the Fergusons petitioned the trial court to be appointed as co-guardians of M.S.G. On October 27, 2003, the trial court appointed the Clintons as co-guardians of N.B.C. and the Fergusons as co-guardians of M.S.G.

In October 2003, the parents attempted to arrange a visit with M.S.G., but were denied by the Fergusons because "they'd not seen [M.S.G.] for three months" and "[the Fergusons] were . . . mommy and daddy [now]." *Id.* at 58. Shortly thereafter, the Fergusons stopped answering or returning the parents' phone calls. During that time, Combs called the Fergusons eight times on October 7, 2003, three times on October 10, 2003, and three times on October 11, 2003. The parents attempted to visit M.S.G. on several other occasions, but were unable to because of financial problems. In December 2003, the Fergusons' phone was shut off, was reconnected from approximately November 2004 to February 2005 when it was again disconnected, and was not reconnected as of May 2, 2005. After the Fergusons' phone was disconnected in December 2003, the parents wrote M.S.G. letters and sent the Fergusons letters requesting visits with M.S.G., to which the Fergusons never replied. They also sent

M.S.G. $40 and some clothes between April and September 2004. Combs did not have physical contact with M.S.G. from August 8, 2003 until November 18, 2004, and Garrison did not have physical contact with M.S.G. until November 21, 2004.

Combs's experience with the Clintons closely resembles Garrison's and her experience with the Fergusons.[1] Combs called the Clintons a few times, and requested visitation during two of those calls. Combs sent the Clintons a check for $10 for the support of N.B.C., but the Clintons never cashed the check because they were concerned it would be dishonored. Combs also sent N.B.C. a stuffed animal, a coloring book, some bubbles, clothes, and diapers. Later, in February 2005, Combs sent N.B.C. more bubbles and clothing. The Clintons, like the Fergusons, stopped returning Combs's phone calls. Combs called the Clintons once on September 27, 2003, eight times on October 1, 2003, and five times on October 3, 2003, each time leaving a message requesting a return phone call.

On July 2, 2004, the parents filed a petition to terminate the Fergusons' guardianship of M.S.G., and Combs filed a petition to terminate the Clintons' guardianship of N.B.C. On September 28, 2004, the parents filed an emergency petition for visitation with M.S.G., and Combs filed an emergency petition for visitation with N.B.C., both of which were granted on November 30, 2004. Before the trial court awarded the parents visitation with M.S.G., the Fergusons regularly refused their efforts to have unsupervised visits with M.S.G. Further, the Fergusons did not cash any of the

[1] Keith, N.B.C.'s biological father, consented to the Clinton's adoption of N.B.C. Keith is not a party to this appeal, and the record is unclear regarding his contact with N.B.C., if any.

checks sent by the parents, explaining "[w]hat is Forty Dollars going to do?" *Id.* at 97. On November 4, 2004, the Fergusons filed a petition to adopt M.S.G., and the Clintons filed a petition to adopt N.B.C. On November 19, 2004, the parents filed a motion to contest the Fergusons' adoption of M.S.G., and Combs filed a motion to contest the Clintons' adoption of N.B.C. On September 7, 2005, the parents filed a motion to resume visitation with M.S.G., and Combs filed a motion to resume visitation with N.B.C. The trial court granted both motions. Thereafter, on October 26, 2005, the trial court concluded the parents did not abandon M.S.G., and Combs did not abandon N.B.C. Both the Fergusons and the Clintons now appeal, raising identical issues. Additional facts are provided as necessary.

The Fergusons and the Clintons contend the trial court erred when it concluded the parents had "contact . . . sufficient to require consent to the adoption" and "the parents . . . [did] not abandon[] [N.B.C. or M.S.G.,]" *Appellant's Appendix* at 175, because the parents did not communicate with or provide support for M.S.G. or N.B.C. We will not disturb the trial court's ruling unless the evidence leads to but one conclusion, and the trial court reached the opposite conclusion. *In re Adoption of C.E.N.*, 847 N.E.2d 267 (Ind. Ct. App. 2006). We do not reweigh the evidence, but rather examine the evidence most favorable to the trial court's judgment, together with all reasonable inferences drawn therefrom, in order to determine whether sufficient evidence exists to sustain the decision. *Id.* Under Ind. Code Ann. § 31-19-10-1.2(a)(2) (West, PREMISE through 2006 Public Laws approved and effective through March 15, 2006), "if a petition for adoption alleges that a parent's consent to adoption is unnecessary . . .[,] and the parent

files a motion to contest the adoption . . ., a petitioner for adoption has the burden of proving that the parent's consent to the adoption is unnecessary" under I.C. § 31-19-9-8(a)(2) (West, PREMISE through 2006 Public Laws approved and effective through March 15, 2006) by clear, cogent, and indubitable evidence.[2] *In re Adoption of C.E.N.*, 847 N.E.2d 267. The decision of the trial court is presumed to be correct, and it is the appellant's burden to overcome that presumption. *Id.*

I.C. § 31-19-9-1 (West, PREMISE through 2006 Public Laws approved and effective through March 15, 2006) provides, in relevant part, that "a petition to adopt a child who is less than eighteen (18) years of age may be granted only if written consent to adoption has been executed by . . . the mother of a child born out of wedlock and the father of a child whose paternity has been established . . . ." I.C. § 31-19-9-8(a)(2), however, states, in relevant part, that:

> (a) Consent to adoption, which may be required under [I.C. § 31-19-9-1], is not required from . . .:

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[2] The Fergusons and the Clintons contend the parents erroneously "argue that 'indubitable' evidence is still required for an adoption without parental consent citing . . . [t]wo . . . cases [that] was [sic] decided before *In re Adoption of M.A.S.*, 815 N.E.2d 216, 219-[]20 (Ind. Ct. App. 2004)[, *trans. denied*,] repudiated those cases . . . ." *Appellants' Reply Brief* at 3. In *In re Adoption of M.A.S.*, a panel of this court concluded the General Assembly intended that all criteria for dispensing with parental consent to adoption be proved by clear and convincing evidence. 815 N.E.2d 216. In all other cases regarding I.C. § 31-19-9-8(2), we have required clear, cogent, and indubitable evidence. *See In re Adoption of C.E.N.*, 847 N.E.2d 267; *McElvain v. Hite*, 800 N.E.2d 947 (Ind. Ct. App. 2003); *Rust v. Lawson*, 714 N.E.2d 769 (Ind. Ct. App. 1999), *trans. denied*. I.C. § 31-19-9-8 was amended by Public Law 61-2003, Sec.11, by adding subsection (a)(11), which states that a parent's consent to adoption is not required when there is "clear and convincing evidence that the parent is unfit to be a parent." Contrary to *In re Adoption of M.A.S.*, we believe the better view, implicitly adopted by this court in *In re Adoption of C.E.N.*, is that the General Assembly intended to confine the "clear and convincing" standard of proof to I.C. § 31-19-9-8(a)(11)'s fitness criteria. This is because (a)(11) is the only subsection in which the "clear and convincing" standard appears in I.C. § 31-19-9-8, thus indicating the legislature's intent that the language in that subsection not modify the entire statute.

. . .

> 2. A parent of a child in the custody of another person if for a period of at least one (1) year the parent:
>
> (A) fails without justifiable cause to communicate significantly with the child when able to do so; or
>
> (B) knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.

We note initially that either of the criteria in I.C. § 31-19-9-8(a)(2) is sufficient to establish that the adoption may move forward without parental consent. *In re Adoption of J.P.*, 713 N.E.2d 873 (Ind. Ct. App. 1999). With respect to the communicative criteria under I.C. § 31-19-9-8(a)(2)(A), a party petitioning to adopt without parental consent has the burden of proving both a lack of communication for the statutory period and that the ability to communicate existed. *In re Adoption of C.E.N.*, 847 N.E.2d 267. Whether this burden has been met is necessarily dependent upon the facts and circumstances of each particular case, including, for example, the guardians' willingness to permit visitation as well as the biological parents' financial and physical means to accomplish their obligations. *See id.* Efforts of guardians to hamper or thwart communication between parent and child are relevant in determining the ability to communicate. *See id.* In order to preserve the consent requirement for adoption, however, the level of communication with the children must be significant, and also must be more than "token efforts" on the part of the parents to communicate with the children. *Id.* The reasonable intent of I.C. § 31-19-9-8(a)(2)(A) is to encourage non-custodial parents to maintain communication with their children and to discourage non-custodial parents from visiting their children

just often enough to thwart the adoptive parents' efforts to provide a settled environment for the children. *Id.*

M.S.G., now four years old, has been in the custody of the Fergusons since she was fourteen months old. Garrison's driver's license is suspended for life, and Combs's driver's license was suspended until approximately August 2004. The parents' suspended driver's licenses rendered them largely unable to maintain physical contact with M.S.G. until August 2004 because they did not live in the same town as the Fergusons. Further, while the Fergusons had custody of M.S.G., the parents called the Fergusons and M.S.G., and later sent letters while the Fergusons' telephone was disconnected. The parents also attempted to arrange visits with M.S.G., but were denied by the Fergusons because "[the Fergusons] were . . . mommy and daddy [now]." *Transcript* at 58. On other occasions, the parents attempted to contact M.S.G., but the Fergusons did not return their phone calls. Likewise, the Clintons continuously thwarted Combs's efforts to communicate with N.B.C. Combs attempted to arrange visits with N.B.C., but the Clintons did not return her calls. On several other occasions, Combs made repeated phone calls to the Clintons, leaving a message each time. The Clintons did not return these phone calls. Accordingly, we find sufficient evidence in the record to support the trial court's conclusion that the parents did not fail to communicate significantly with M.S.G. because, when able to do so, their efforts to communicate were thwarted by the Fergusons and the Clintons. *See* I.C. § 31-19-9-8(a)(2)(A).

The Fergusons and the Clintons, by counsel, next contend the parents failed to provide support, stating, "[t]he deicisons [sic] by the tiral [sic] court in the two cases only

found not abandoment [sic] because the paents [sic] had filed peladings [sic] to establish visition [sic]. The quesiton [sic] of fialure [sic] to provide supprot [sic] was not addess [sic] by the tiral [sic] court." *Appellant's Appendix* at 15. We presume the Fergusons and the Clintons intended to argue a parent's failure to provide support is an independent criterion by which the trial court may dispense with parental consent to adoption. A biological parent's consent to adoption may not be obviated unless it is shown the parent "knowingly" failed to provide support "when able to do so." *In re Adoption of Augustyniak*, 505 N.E.2d 868, 872 (Ind. Ct. App. 1987) (quoting Ind. Code Ann. § 31-3-1-6(g)(1), *repealed by* Public Law 1-1997, Sec. 157, *recodified as* I.C. § 31-19-9-8(a)(2)(B)), *trans. denied*. The statute clearly requires the petitioner to demonstrate the biological parent had the ability and a legal obligation to provide for the support of the child and did not do so. *In re Adoption of Augustyniak*, 505 N.E.2d 868; I.C. § 31-19-9-8(a)(2)(B). Where this is absent, the evidence must be deemed insufficient to sustain the granting of the petition on this ground. *In re Adoption of Augustyniak*, 505 N.E.2d 868.

Initially, we note that, even in the absence of a support order, "Indiana law imposes a duty upon a parent to support his children . . . [that] exists apart from any court order or statute." *In re Adoption of M.A.S.*, 815 N.E.2d at 220. The parents, therefore, were required to provide for the care and support of M.S.G. and N.B.C. While the Fergusons and the Clintons were in custody of M.S.G. and N.B.C., the parents sent them checks totaling $40. Neither the Fergusons nor the Clintons, however, cashed those checks. Combs testified that, had they cashed the checks, the parents would have sent additional money. Further, the parents sent each child clothing, diapers and other baby

supplies, and toys. The Fergusons and the Clintons make much of the fact that the parents were employed and that they had money to buy cigarettes. Without more, however, this is insufficient to indicate the parents' ability to pay support, nor can such an inference reasonably be drawn from this evidence. *See In re Adoption of Augustyniak*, 505 N.E.2d 868.

The Fergusons and the Clintons direct our attention to several cases they claim support reversal of the trial court's judgment. One such case is *In re Adoption of A.K.S.*, 713 N.E.2d 896 (Ind. Ct. App. 1999), *trans. denied*, in which the trial court concluded the biological father's consent to adoption was unnecessary because he failed to provide support for his children for six years. The Fergusons and the Clintons, unlike the step-father in *In re Adoption of A.K.S.*, thwarted any efforts by the parents' to provide for the care and support of M.S.G. and N.B.C. by not cashing checks and demonstrating an unwillingness to accommodate the parents' subsequent efforts. The Fergusons and the Clintons further cite *Irvin v. Hood*, 712 N.E.2d 1012 (Ind. Ct. App. 1999), in which the trial court concluded the biological father's consent to adoption was unnecessary because he failed to provide support for his children. On appeal, we affirmed the trial court's decision because the "evidence show[ed] that in the three years before [the step-father] filed the petition for adoption, [the father] provided no monetary support for the child . . . [even though] [h]e was financially able to travel abroad for two months . . . to play rugby." *Id.* at 1013-14. The Fergusons and the Clintons, unlike the step-father in *Irvin v. Hood*, failed to demonstrate by clear, cogent, and indubitable evidence that the parents were able to provide support for M.S.G. and N.B.C. Indeed, during the relevant time

period, the parents initially lived in their car, continue to live in subsidized housing, and have bounced from one job to another. We cannot, therefore, say the evidence leads to but one conclusion, that is, that the parents knowingly failed to provide for the support of M.S.G. and N.B.C. while able to do so. *See In re Adoption of C.E.N.*, 847 N.E.2d 267; I.C. § 31-19-9-8(a)(2)(B). Because the Fergusons and the Clintons failed to meet the burden of proof in establishing that the parents' consent to the adoption was not required under I.C. § 31-19-9-8(a)(2), the trial court did not abuse its discretion in denying their petitions for adoption.

Judgment affirmed.[3]

NAJAM, J., and DARDEN, J., concur.

[3] We deny the Fergusons' and the Clintons' requests for appellate costs and filing fees.